

(5) An individual care plan shall be provided for a participant based on the need for such plan as determined by the competent professional authority, except that any participant, parent, or caretaker shall receive such plan upon request.

(6) Contacts shall be designed to meet different cultural and language needs of Program participants.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 58 FR 11507, Feb. 26, 1993; 59 FR 11503, Mar. 11, 1994; 65 FR 53528, Sept. 5, 2000; 71 FR 56731, Sept. 27, 2006; 73 FR 11312, Mar. 3, 2008]

Subpart E—State Agency Provisions

§ 246.12 Food delivery systems.

(a) *General.* This section sets forth design and operational requirements for food delivery systems. In recognition of emergent electronic benefits transfer (EBT) technology, FNS may, on a case-by-case basis, modify regulatory provisions to the extent FNS determines the particular EBT system provides adequate safeguards that serve the purpose of the provisions being modified.

(1) *Management.* The State agency is responsible for the fiscal management of, and accountability for, food delivery systems under its jurisdiction. The State agency may permit only authorized vendors and farmers, home food delivery contractors, and direct distribution sites to accept food instruments and cash-value vouchers.

(2) *Design.* The State agency must design all food delivery systems to be used by its local agencies.

(3) *FNS oversight.* FNS may, for a stated cause and by written notice, require revision of a proposed or operating food delivery system and will allow a reasonable time for the State agency to effect such a revision.

(4) *Part 3016.* All contracts or agreements entered into by the State or local agency for the management or operation of food delivery systems must conform to the requirements of part 3016 of this title.

(b) *Uniform food delivery systems.* The State agency may operate up to three types of food delivery systems under its jurisdiction—retail, home delivery,

or direct distribution. Each system must be procedurally uniform throughout the jurisdiction of the State agency and must ensure adequate participant access to supplemental foods. When used, food instruments must be uniform within each type of system.

(c) *No charge for authorized supplemental foods.* The State agency must ensure that participants receive their authorized supplemental foods free of charge.

(d) *Compatibility of food delivery system.* The State agency must ensure that the food delivery system(s) selected is compatible with the delivery of health and nutrition education services to participants.

(e) *Retail food delivery systems: General.* Retail food delivery systems are systems in which participants, parents or caretakers of infant and child participants, and proxies obtain authorized supplemental foods by submitting a food instrument or cash-value voucher to an authorized vendor.

(f) *Retail food delivery systems: Food instrument and cash-value voucher requirements—(1) General.* State agencies using retail food delivery systems must use food instruments and cash-value vouchers that comply with the requirements of paragraph (f)(2) of this section.

(2) *Printed food instruments and cash-value vouchers.* Each printed food instrument and cash-value voucher must clearly bear on its face the following information:

(i) *Authorized supplemental foods.* The supplemental foods authorized to be obtained with the food instrument or cash-value voucher;

(ii) *First date of use.* The first date on which the food instrument or cash-value voucher may be used to obtain supplemental foods;

(iii) *Last date of use.* The last date on which the food instrument or cash-value vouchers may be used to obtain authorized supplemental foods. This date must be a minimum of 30 days from the first date on which it may be used, except for the participant's first month of issuance, when it may be the end of the month or cycle for which the food instrument or cash-value voucher

is valid. Rather than entering a specific last date of use on each instrument or cash-value voucher, all instruments or cash-value vouchers may be printed with a notice that the participant must transact them within a specified number of days after the first date on which the food instrument or cash-value voucher may be used;

(iv) *Redemption period.* The date by which the vendor must submit the food instrument or cash-value voucher for redemption. This date must be no more than 60 days from the first date on which the food instrument or cash-value voucher may be used. If the date is fewer than 60 days, then the State agency must ensure that the allotted time provides the vendor sufficient time to submit the food instrument or cash-value voucher for redemption without undue burden;

(v) *Serial number.* A unique and sequential serial number;

(vi) *Purchase price.* A space for the purchase price to be entered. At the discretion of the State agency, a maximum price may be printed on the food instrument that is higher than the expected purchase price of the authorized supplemental foods for which it will be used, but that is low enough to protect against potential loss of funds. When a maximum price is printed on the food instrument, the space for the purchase price must be clearly distinguishable from the maximum price. For example, the words "purchase price" or "actual amount of sale" could be printed larger and in a different area of the food instrument than the maximum price; and

(vii) *Signature space.* A space where participants, parents or caretakers of infant or child participants, or proxies must sign.

(3) *Vendor identification.* The State agency must implement procedures to ensure each food instrument and cash-value voucher submitted for redemption can be identified by the vendor or farmer that submitted the food instrument or cash-value voucher. Each vendor operated by a single business entity must be identified separately. The State agency may identify vendors by requiring that all authorized vendors stamp their names and/or enter a vendor identification number on all food instruments or cash-value vouchers

prior to submitting them for redemption.

(g) *Retail food delivery systems: Vendor authorization—(1) General.* The State agency must authorize an appropriate number and distribution of vendors in order to ensure the lowest practicable food prices consistent with adequate participant access to supplemental foods and to ensure effective State agency management, oversight, and review of its authorized vendors.

(2) *Vendor limiting criteria.* The State agency may establish criteria to limit the number of stores it authorizes. The State agency must apply its limiting criteria consistently throughout its jurisdiction. Any vendor limiting criteria used by the State agency must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(3) *Vendor selection criteria.* The State agency must develop and implement criteria to select stores for authorization. The State agency must apply its selection criteria consistently throughout its jurisdiction. The State agency may reassess any authorized vendor at any time during the vendor's agreement period using the vendor selection criteria in effect at the time of the reassessment and must terminate the agreements with those vendors that fail to meet them. The vendor selection criteria must include the following categories and requirements and must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(i) *Minimum variety and quantity of supplemental foods.* The State agency must establish minimum requirements for the variety and quantity of supplemental foods that a vendor applicant must stock to be authorized. These requirements include that the vendor stock at least two varieties of fruits, two varieties of vegetables, and at least one whole grain cereal authorized by the State agency. The State agency may not authorize a vendor applicant unless it determines that the vendor applicant meets these minimums. The State agency may establish different minimums for different vendor peer groups. The State agency may not authorize a vendor applicant unless it determines that the vendor applicant obtains infant formula only from sources

included on the State agency's list described in paragraph (g)(11) of this section.

(ii) *Business integrity.* The State agency must consider the business integrity of a vendor applicant. In determining the business integrity of a vendor applicant, the State agency may rely solely on facts already known to it and representations made by the vendor applicant on its vendor application. The State agency is not required to establish a formal system of background checks for vendor applicants. Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant if during the last six years the vendor applicant or any of the vendor applicant's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity. Activities indicating a lack of business integrity include fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice. The State agency may add other types of convictions or civil judgments to this list.

(iii) *Current Food Stamp Program disqualification or civil money penalty for hardship.* Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant that is currently disqualified from the Food Stamp Program or that has been assessed a Food Stamp Program civil money penalty for hardship and the disqualification period that would otherwise have been imposed has not expired.

(iv) *Provision of incentive items.* The State agency may not authorize or continue the authorization of an above-50-percent vendor, or make payments to an above-50-percent vendor, which provides or indicates an intention to provide prohibited incentive items to customers. Evidence of such intent includes, but is not necessarily limited to, advertising the availability of prohibited incentive items.

(A) The State agency may approve any of the following incentive items to be provided by above-50-percent vendors to customers, at the discretion of the State agency:

(1) Food, merchandise, or services obtained at no cost to the vendor, subject to documentation;

(2) Food, merchandise, or services of nominal value, i.e., having a per item cost of less than \$2, subject to documentation;

(3) Food sales and specials which involve no cost or less than \$2 in cost to the vendor for the food items involved, subject to documentation, and do not result in a charge to a WIC food instrument for foods in excess of the foods listed on the food instrument;

(4) Minimal customary courtesies of the retail food trade, such as helping the customer to obtain an item from a shelf or from behind a counter, bagging food for the customer, and assisting the customer with loading the food into a vehicle.

(B) The following incentive items are prohibited for above-50-percent vendors to provide to customers:

(1) Services which result in a conflict of interest or the appearance of such conflict for the above-50-percent vendor, such as assistance with applying for WIC benefits;

(2) Lottery tickets provided to customers at no charge or below face value;

(3) Cash gifts in any amount for any reason;

(4) Anything made available in a public area as a complimentary gift which may be consumed or taken without charge;

(5) An allowable incentive item provided more than once per customer per shopping visit, regardless of the number of customers or food instruments involved, unless the incentive items had been obtained by the vendor at no cost or the total value of multiple incentive items provided during one shopping visit would not exceed the less-than-\$2 nominal value limit;

(6) Food, merchandise or services of greater than nominal value provided to the customer;

Food and Nutrition Service, USDA

§ 246.12

(7) Food, merchandise sold to customers below cost, or services purchased by customers below fair market value;

(8) Any kind of incentive item which incurs a liability for the WIC Program;

(9) Any kind of incentive item which violates any Federal, State, or local law or regulations.

(C) For-profit goods or services offered by the above-50-percent vendor to WIC participants at a fair market value based on comparable for-profit goods or services of other businesses are not incentive items subject to approval or prohibition, except that such goods or services must not constitute a conflict of interest or result in a liability for the WIC Program.

(4) *Vendor selection criteria: competitive price.* The State agency must establish a vendor peer group system and distinct competitive price criteria and allowable reimbursement levels for each peer group. The State agency must use the competitive price criteria to evaluate the prices a vendor applicant charges for supplemental foods as compared to the prices charged by other vendor applicants and authorized vendors, and must authorize vendors selected from among those that offer the program the most competitive prices. The State agency must consider a vendor applicant's shelf prices or the prices it bids for supplemental foods, which may not exceed its shelf prices. In establishing competitive price criteria and allowable reimbursement levels, the State agency must consider participant access by geographic area. The State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment.

(i) *Vendors that meet the above-50-percent criterion.* Vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS, are defined as above-50-percent vendors. Each State agency annually must implement procedures approved by FNS to identify authorized vendors and vendor applicants as either above-50-percent vendors or regular vendors, in accordance with paragraphs (g)(4)(i)(E) and

(g)(4)(i)(F) of this section. The State agency must receive FNS certification of its vendor cost containment system under section 246.12(g)(4)(vi) prior to authorizing any above-50-percent vendors. The State agency that chooses to authorize any above-50-percent vendors:

(A) Must distinguish these vendors from other authorized vendors in its peer group system or its alternative cost containment system approved by FNS by establishing separate peer groups for above-50-percent vendors or by placing above-50-percent vendors in peer groups with other vendors and establishing distinct competitive price selection criteria and allowable reimbursement levels for the above-50-percent vendors;

(B) Must reassess the status of new vendors within six months after authorization to determine whether or not the vendors are above-50-percent vendors, and must take necessary follow-up action, such as terminating vendor agreements or reassigning vendors to the appropriate peer group;

(C) Must compare above-50-percent vendors' prices against the prices of vendors that do not meet the above-50-percent criterion in determining whether the above-50-percent vendors have competitive prices and in establishing allowable reimbursement levels for such vendors; and

(D) Must ensure that the prices of above-50-percent vendors do not inflate the competitive price criteria and allowable reimbursement levels for the peer groups or result in higher total food costs if program participants transact their food instruments at above-50-percent vendors rather than at other vendors that do not meet the above-50-percent criterion. To comply with this requirement, the State agency must compare the average cost of each type of food instrument redeemed by above-50-percent vendors against the average cost of the same type of food instrument redeemed by regular vendors. The average cost per food instrument may be weighted to reflect the relative proportion of food instruments redeemed by each category of vendors in the peer group system. The State agency must compute statewide average costs per food instrument at

least quarterly to monitor compliance with this requirement. If average payments per food instrument for above-50-percent vendors exceed average payments per food instrument to regular vendors, then the State agency must take necessary action to ensure compliance, such as adjusting payment levels. Where EBT systems are in use, it may be more appropriate to compare prices of individual WIC food items to ensure that average payments to above-50-percent vendors do not exceed average payments for the same food item to comparable vendors. If FNS determines that a State agency has failed to ensure that above-50-percent vendors do not result in higher costs to the program than if participants transact their food instruments at regular vendors, FNS will establish a claim against the State agency to recover excess food funds expended and will require remedial action. A State agency may exclude partially-redeemed food instruments from a quarterly cost neutrality assessment based on an empirical methodology approved by FNS. A State agency may not exclude food instruments from the quarterly cost neutrality assessment based on a rate of partially-redeemed food instruments.

(E) Must determine whether vendor applicants are expected to be above-50-percent vendors. The State agency must ask vendor applicants whether they expect to derive more than 50 percent of their annual revenue from the sale of food items from transactions involving WIC food instruments. This question applies whether or not the State agency chooses to authorize above-50-percent vendors. A vendor who answers in the affirmative must be treated as an above-50-percent vendor. The State agency must further assess a vendor who answers in the negative, by first calculating WIC redemptions as a percent of total food sales in existing WIC-authorized stores owned by the vendor applicant. Second, the State agency must calculate or request from the vendor applicant the percentage of anticipated food sales by type of payment, *i.e.*, cash, Supplemental Nutrition Assistance Program, WIC, and credit/debit card. Third, the State agency must review either the inventory invoices for food items, or the ac-

tual food items present at the preauthorization visit required by paragraph (g)(5) of this section, or both. Fourth, the State agency must determine whether WIC authorization is required in order for the store to open for business. If the vendor would be expected to be an above-50-percent vendor under any of these criteria, then the vendor must be treated as an above-50-percent vendor. State agencies may use additional data sources and methodologies, if approved by FNS.

(F) Must determine whether a currently authorized vendor meets the above-50-percent criterion, based on the State agency's calculation of WIC redemptions as a percent of the vendor's total foods sales for the same period. If WIC redemptions are more than 50 percent of the total food sales, the vendor must be deemed to be an above-50-percent vendor. As an initial step in identifying above-50-percent vendors, the State agency may compare each vendor's WIC redemptions to Supplemental Nutrition Assistance Program redemptions for the same period. If more than one WIC State agency authorizes a particular vendor, then each State agency must obtain and add the WIC redemptions for each State agency that authorizes the vendor to derive the total WIC redemptions. If Supplemental Nutrition Assistance Program redemptions exceed WIC redemptions, no further assessment is required since the vendor would not be an above-50-percent vendor. For vendors whose WIC redemptions exceed their Supplemental Nutrition Assistance Program redemptions, or if this comparison of redemptions was not made, the State agency must obtain from these vendors a statement of the total amount of revenue derived from the sale of foods that could be purchased using Supplemental Nutrition Assistance Program benefits. The State agency must also obtain from these vendors documentation (such as tax documents or other verifiable documentation) to support the amount of food sales claimed by the vendor. After evaluating the documentation received from the vendor, the State agency must calculate WIC redemptions as a percent of total food

sales and classify the vendor as meeting or not meeting the above-50-percent criterion. State agencies may use additional methods, if approved by FNS.

(ii) *Implementing effective peer groups.* The State agency's methodology for establishing a vendor peer group system must include the following:

(A) At least two criteria for establishing peer groups, one of which must be a measure of geography, such as metropolitan or other statistical areas that form distinct labor and products markets, unless the State agency receives FNS approval to use a single criterion;

(B) Routine collection of vendor shelf prices at least every six months following authorization to monitor vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section and to ensure State agency policies and procedures dependent on shelf price data are efficient and effective. FNS may grant an exemption from this shelf price collection requirement if the State agency demonstrates to FNSs' satisfaction that an alternative methodology for monitoring vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section is efficient and effective and other State agency policies and procedures are not dependent on frequent collection of shelf price data. Such exemption would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first;

(C) Assessment of the effectiveness of the peer groupings and competitive price criteria at least every three years and modification, as necessary, to enhance system performance. The State agency may change a vendor's peer group whenever the State agency determines that placement in an alternate peer group is warranted.

(iii) *Subsequent price increases.* The State agency must establish procedures to ensure that a vendor selected for participation in the program does not, subsequent to selection, increase prices to levels that would make the vendor ineligible for authorization.

(iv) *Exceptions to competitive price criteria.* The State agency may except from the competitive price criteria and allowable reimbursement levels pharmacy vendors that supply only exempt infant formula and/or WIC-eligible medical foods, and non-profit vendors for which more than 50 percent of their annual revenue from food sales consists of revenue derived from WIC food instruments. A State agency that elects to exempt non-profit vendors from competitive price criteria and/or allowable reimbursements levels must notify FNS, in writing, at least 30 days prior to the effective date of the exemption. The State agency's notification must indicate the reason for the exemption, including whether the vendor is needed to ensure participant access, why other vendors that are subject to competitive price criteria and allowable reimbursement levels cannot provide the required supplemental foods, the benefits to the program of exempting the non-profit vendor from the competitive price criteria and/or allowable reimbursement levels, the criteria the State agency used to assess the competitiveness of the non-profit vendor's prices, and how the State agency will determine the reimbursement level for the non-profit vendor. This notification requirement does not apply to State agency contracts and agreements with non-profit health and/or human service agencies or organizations.

(v) *Exemptions from the vendor peer group system requirement.* With prior written approval from FNS, a State agency may use a vendor cost containment approach other than a peer group system if it meets certain conditions. A State agency that obtains an exemption from the peer group requirement still must establish competitive pricing criteria for vendor selection and allowable reimbursement levels. An exemption from the peer group requirement would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first. During the period of the exemption, the State agency must provide annually to FNS documentation that it either authorizes no above-50-

percent vendors, or that such vendors' redemptions continue to represent less than five percent of total WIC redemptions, depending on the terms of the exemption. The conditions for obtaining an exemption from the vendor peer group system are as follows:

(A) The State agency chooses not to authorize any vendors that derive more than 50 percent of their revenue from food sales from WIC food instruments, and the State agency demonstrates to FNS that establishing a vendor peer group system would be inconsistent with efficient and effective operation of the program, or that its alternative cost containment system would be as effective as a peer group system; or

(B) The State agency determines that food instruments redeemed by vendors that meet the above-50-percent criterion comprise less than five percent of the total WIC redemptions in the State in the fiscal year prior to a fiscal year in which the exemption is effective; and the State agency demonstrates to FNS that its alternative vendor cost containment system would be as effective as a vendor peer group system and would not result in higher costs if program participants redeem food instruments at vendors that meet the above-50-percent criterion rather than at vendors that do not meet this criterion.

(vi) *Cost containment certification.* If a State agency elects to authorize any above-50-percent vendors, the State agency must submit information, in accordance with guidance provided by FNS, to demonstrate that its competitive price criteria and allowable reimbursement levels do not result in average payments per food instrument to these vendors that are higher than average payments per food instrument to comparable vendors that are not above-50-percent vendors. To calculate average payments per food instrument, the State agency must include either all food instruments redeemed by all authorized vendors or a representative sample of the redeemed food instruments. The State agency must add the redemption amounts for all redeemed food instruments of the same type and divide the sum by the number of food instruments of that type. If the State agency does not designate food instru-

ments by type, it must calculate the average payment for each distinct combination of foods prescribed on the food instrument. The State agency may calculate average payments per food instrument type for groups of vendors that meet the above-50-percent criterion and comparable vendors, or the State agency may calculate average payments for each food instrument type for each vendor. State agencies with EBT systems must compare the average cost of each WIC food purchased by participants at above-50-percent vendors with the average cost of each food purchased from comparable vendors. If FNS determines, based on its review of the information provided by the State agency and any other relevant data, that the requirements in this paragraph have been met, FNS will certify that the State agency's competitive price criteria and allowable reimbursement levels established for above-50-percent vendors do not result in higher average payments per food instrument (or higher costs for each WIC food item in EBT systems). If the State agency's methodology for establishing competitive price criteria and allowable reimbursement levels fails to meet the requirement of this section regarding average food instrument payments to above-50-percent vendors, FNS will disapprove the State agency's request to authorize above-50-percent vendors. At least every three years following initial certification, the State agency must submit information which demonstrates that it continues to meet the requirements of this section relative to average payments to above-50-percent vendors. FNS may require annual updates of selected food instrument redemption data.

(vii) *Limitation on private rights of action.* The competitive pricing provisions of this paragraph do not create a private right of action.

(5) *No imposition of EBT costs on retail vendors.* The State agency may not impose the costs of EBT equipment, systems, or processing required for electronic benefit transfers on any retail

Food and Nutrition Service, USDA

§ 246.12

store authorized to transact food instruments, as a condition for authorization or participation in the program. The State agency may allow retailers to contribute to such costs on a voluntary basis.

(6) *On-site preauthorization visit.* The State agency must conduct an on-site visit prior to or at the time of a vendor's initial authorization.

(7) *Sale of store to circumvent WIC sanction.* The State agency may not authorize a vendor applicant if the State agency determines the store has been sold by its previous owner in an attempt to circumvent a WIC sanction. The State agency may consider such factors as whether the store was sold to a relative by blood or marriage of the previous owner(s) or sold to any individual or organization for less than its fair market value.

(8) *Impact on small businesses.* The State agency is encouraged to consider the impact of authorization decisions on small businesses.

(9) *Application periods.* The State agency may limit the periods during which applications for vendor authorization will be accepted and processed, except that applications must be accepted and processed at least once every three years. The State agency must develop procedures for processing vendor applications outside of its timeframes when it determines there will be inadequate participant access unless additional vendors are authorized.

(10) *Data collection at authorization.* At the time of application, the State agency must collect the vendor applicant's Food Stamp Program authorization number if the vendor applicant is authorized in that program. In addition, the State agency must collect the vendor applicant's current shelf prices for supplemental foods.

(11) *List of infant formula wholesalers, distributors, and retailers licensed under State law or regulations, and infant formula manufacturers registered with the Food and Drug Administration (FDA).* The State agency must provide a list in writing or by other effective means to all authorized WIC retail vendors of the names and addresses of infant formula wholesalers, distributors, and retailers licensed in the State in accordance with State law (including regulations),

and infant formula manufacturers registered with the Food and Drug Administration (FDA) that provide infant formula, on at least an annual basis.

(i) *Notification to vendors.* The State agency is required to notify vendors that they must purchase infant formula only from a source included on the State agency's list, or from a source on another State agency's list if the vendor's State agency permits this, and must only provide such infant formula to participants in exchange for food instruments specifying infant formula. For the purposes of paragraph (g)(11) of this section, "infant formula" means *Infant formula*, *Contract brand infant formula* and *Non-contract brand infant formula* as defined in § 246.2, and infant formula covered by a waiver granted under § 246.16a(e).

(ii) *Type of license.* If more than one type of license applies, the State agency may choose which one to use.

(iii) *Exclusions from list.* The State agency may not exclude a State-licensed entity from the list except when:

(A) Specifically required or authorized by State law or regulations; or

(B) The entity does not carry infant formula.

(h) *Retail food delivery systems: Vendor agreements—(1) General—(i) Entering into agreements.* The State agency must enter into written agreements with all authorized vendors. The agreements must be for a period not to exceed three years. The agreement must be signed by a representative who has legal authority to obligate the vendor and a representative of the State agency. When the vendor representative is obligating more than one vendor, the agreement must specify all vendors covered by the agreement. When more than one vendor is specified in the agreement, the State agency may add or delete an individual vendor without affecting the remaining vendors. The State agency must require vendors to reapply at the expiration of their agreements and must provide vendors with not less than 15 days advance written notice of the expiration of their agreements.

(ii) *Delegation to local agencies.* The State agency may delegate to its local agencies the authority to sign vendor

agreements if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(iii). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of local agency activities.

(2) *Standard vendor agreement.* The State agency must use a standard vendor agreement throughout its jurisdiction, although the State agency may make exceptions to meet unique circumstances provided that it documents the reasons for such exceptions.

(3) *Vendor agreement provisions.* The vendor agreement must contain the following specifications, although the State agency may determine the exact wording to be used:

(i) *Acceptance of food instruments and cash value vouchers.* The vendor may accept food instruments and cash-value vouchers only from participants, parents or caretakers of infant and child participants, or proxies.

(ii) *No substitutions, cash, credit, refunds, or exchanges.* The vendor may provide only the authorized supplemental foods listed on the food instrument and cash-value voucher.

(A) The vendor may not provide unauthorized food items, nonfood items, cash, or credit (including rain checks) in exchange for food instruments or cash-value vouchers. The vendor may not provide refunds or permit exchanges for authorized supplemental foods obtained with food instruments or cash-value vouchers, except for exchanges of an identical authorized supplemental food item when the original authorized supplemental food item is defective, spoiled, or has exceeded its “sell by,” “best if used by,” or other date limiting the sale or use of the food item. An identical authorized supplemental food item means the exact brand and size as the original authorized supplemental food item obtained and returned by the participant.

(B) The vendor may provide only the authorized infant formula which the vendor has obtained from sources included on the list described in paragraph (g)(11) of this section to participants in exchange for food instruments specifying infant formula.

(iii) *Treatment of participants, parents/ caretakers, and proxies.* The vendor must offer program participants, parents or caretakers of infant or child participants, and proxies the same courtesies offered to other customers.

(iv) *Time periods for transacting food instruments and cash-value vouchers.* The vendor may accept a food instrument or cash-value voucher only within the specified time period.

(v) *Purchase price on food instruments and cash-value vouchers.* The vendor must ensure that the purchase price is entered on food instruments and cash-value vouchers in accordance with the procedures described in the vendor agreement. The State agency has the discretion to determine whether the vendor or the participant enters the purchase price. The purchase price must include only the authorized supplemental food items actually provided and must be entered on the food instrument or cash-value voucher before it is signed.

(vi) *Signature on food instruments and cash-value vouchers.* For printed food instruments and cash-value vouchers, the vendor must ensure the participant, parent or caretaker of an infant or child participant, or proxy signs the food instrument or cash-value voucher in the presence of the cashier. In EBT systems, a Personal Identification Number (PIN) may be used in lieu of a signature.

(vii) *Sales tax prohibition.* The vendor may not collect sales tax on authorized supplemental foods obtained with food instruments.

(viii) *Food instrument redemption.* The vendor must submit food instruments for redemption in accordance with the redemption procedures described in the vendor agreement. The vendor may redeem a food instrument only within the specified time period. As part of the redemption procedures, the State agency may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the price limitations applicable to the vendor. As part of the redemption procedures, the State agency must establish and apply limits on the amount of reimbursement allowed for food instruments based on a vendor's peer group

and competitive price criteria. In setting allowable reimbursement levels, the State agency must consider participant access in a geographic area and may include a factor to reflect fluctuations in wholesale prices. In establishing allowable reimbursement levels for above-50-percent vendors the State agency must ensure that reimbursements do not result in higher food costs than if participants transacted their food instruments at vendors that are not above-50-percent vendors, or in higher average payments per food instrument to above-50-percent vendors than average payments to comparable vendors. The State agency may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the allowable reimbursement level applicable to the vendor. A vendor's failure to remain price competitive is cause for termination of the vendor agreement, even if actual payments to the vendor are within the maximum reimbursement amount. The State agency may exempt vendors that supply only exempt infant formula and/or WIC-eligible medical foods and non-profit above-50-percent vendors from the allowable reimbursement limits.

(ix) *Vendor claims.* When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency will delay payment or establish a claim. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument or cash-value voucher that contained the vendor overcharge or other error. The State agency will provide the vendor with an opportunity to justify or correct a vendor overcharge or other error. The vendor must pay any claim assessed by the State agency. In collecting a claim, the State agency may offset the claim against current and subsequent amounts to be paid to the vendor. In addition to denying payment or assessing a claim, the State agency may sanction the vendor for vendor overcharges or other errors in accordance with the State agency's sanction schedule.

(x) *No charge for authorized supplemental foods or restitution from partici-*

pants. The vendor may not charge participants, parents or caretakers of infant and child participants, or proxies for authorized supplemental foods obtained with food instruments or cash-value vouchers. In addition, the vendor may not seek restitution from these individuals for food instruments or cash-value vouchers not paid or partially paid by the State agency. The State agency may, however, allow participants, parents or caretakers of child participants to pay the difference when the purchase of authorized fruits and vegetables exceeds the value of the cash-value voucher.

(xi) *Training.* At least one representative of the vendor must participate in training annually. Annual vendor training may be provided by the State agency in a variety of formats, including newsletters, videos, and interactive training. The State agency will have sole discretion to designate the date, time, and location of all interactive training, except that the State agency will provide the vendor with at least one alternative date on which to attend such training.

(xii) *Vendor training of staff.* The vendor must inform and train cashiers and other staff on program requirements.

(xiii) *Accountability for owners, officers, managers, and employees.* The vendor is accountable for its owners, officers, managers, agents, and employees who commit vendor violations.

(xiv) *Monitoring.* The vendor may be monitored for compliance with program requirements.

(xv) *Recordkeeping.* The vendor must maintain inventory records used for Federal tax reporting purposes and other records the State agency may require for the period of time specified by the State agency in the vendor agreement. Upon request, the vendor must make available to representatives of the State agency, the Department, and the Comptroller General of the United States, at any reasonable time and place for inspection and audit, all food instruments and cash-value vouchers in the vendor's possession and all program-related records.

(xvi) *Termination.* The State agency will immediately terminate the agreement if it determines that the vendor

has provided false information in connection with its application for authorization. Either the State agency or the vendor may terminate the agreement for cause after providing advance written notice of a period of not less than 15 days to be specified by the State agency.

(xvii) *Change in ownership or location or cessation of operations.* The vendor must provide the State agency advance written notification of any change in vendor ownership, store location, or cessation of operations. In such instances, the State agency will terminate the vendor agreement, except that the State agency may permit vendors to move short distances without terminating the agreement. The State agency has the discretion to determine the length of advance notice required for vendors reporting changes under this provision, whether a change in location qualifies as a short distance, and whether a change in business structure constitutes a change in ownership.

(xviii) *Sanctions.* In addition to claims collection, the vendor may be sanctioned for vendor violations in accordance with the State agency's sanction schedule. Sanctions may include administrative fines, disqualification, and civil money penalties in lieu of disqualification. The State agency must notify a vendor in writing when an investigation reveals an initial incidence of a violation for which a pattern of incidences must be established in order to impose a sanction, before another such incidence is documented, unless the State agency determines, in its discretion, on a case-by-case basis, that notifying the vendor would compromise an investigation.

(xix) *Conflict of interest.* The State agency will terminate the agreement if the State agency identifies a conflict of interest, as defined by applicable State laws, regulations, and policies, between the vendor and the State agency or its local agencies.

(xx) *Criminal penalties.* A vendor who commits fraud or abuse in the Program is liable to prosecution under applicable Federal, State or local laws. Those who have willfully misapplied, stolen or fraudulently obtained program funds will be subject to a fine of not more than \$25,000 or imprisonment for not

more than five years or both, if the value of the funds is \$100 or more. If the value is less than \$100, the penalties are a fine of not more than \$1,000 or imprisonment for not more than one year or both.

(xxi) *Not a license/property interest.* The vendor agreement does not constitute a license or a property interest. If the vendor wishes to continue to be authorized beyond the period of its current agreement, the vendor must reapply for authorization. If a vendor is disqualified, the State agency will terminate the vendor's agreement, and the vendor will have to reapply in order to be authorized after the disqualification period is over. In all cases, the vendor's new application will be subject to the State agency's vendor selection criteria and any vendor limiting criteria in effect at the time of the reapplication.

(xxii) *Compliance with vendor agreement, statutes, regulations, policies, and procedures.* The vendor must comply with the vendor agreement and Federal and State statutes, regulations, policies, and procedures governing the Program, including any changes made during the agreement period.

(xxiii) *Nondiscrimination regulations.* The vendor must comply with the nondiscrimination provisions of Departmental regulations (parts 15, 15a and 15b of this title).

(xxiv) *Compliance with vendor selection criteria.* The vendor must comply with the vendor selection criteria throughout the agreement period, including any changes to the criteria. Using the current vendor selection criteria, the State agency may reassess the vendor at any time during the agreement period. The State agency will terminate the vendor agreement if the vendor fails to meet the current vendor selection criteria.

(xxv) *Reciprocal Food Stamp Program disqualification for WIC Program disqualifications.* Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

Food and Nutrition Service, USDA

§ 246.12

(4) *Purchase price and redemption procedures.* The State agency must describe in the vendor agreement its purchase price and redemption procedures. The redemption procedures must ensure that the State agency does not pay a vendor more than the price limitations applicable to the vendor.

(5) *Sanction schedule.* The State agency must include its sanction schedule in the vendor agreement or as an attachment to it. The sanction schedule must include all mandatory and State agency vendor sanctions and must be consistent with paragraph (1) of this section. If the sanction schedule is in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(6) *Actions subject to administrative review and review procedures.* The State agency must include the adverse actions a vendor may appeal and those adverse actions that are not subject to administrative review. The State agency also must include a copy of the State agency's administrative review procedures in the vendor agreement or as an attachment to it or must include a statement that the review procedures are available upon request and the applicable review procedures will be provided along with an adverse action subject to administrative review. These items must be consistent with § 246.18. If these items are in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(7) *Notification of program changes.* The State agency must notify vendors of changes to Federal or State statutes, regulations, policies, or procedures governing the Program before the changes are implemented. The State agency should give as much advance notice as possible.

(8) *Allowable and prohibited incentive items for above-50-percent vendors.* The vendor agreement for an above-50-percent vendor, or another document provided to the vendor and cross-referenced in the agreement, must include the State agency's policies and procedures

for allowing and prohibiting incentive items to be provided by an above-50-percent vendor to customers, consistent with paragraph (g)(3)(iv) of this section.

(i) The State agency must provide written approval or disapproval (including by electronic means such as electronic mail or facsimile) of requests from above-50-percent vendors for permission to provide allowable incentive items to customers;

(ii) The State agency must maintain documentation for the approval process, including invoices or similar documents showing that the cost of each item is either less than the \$2 nominal value limit, or obtained at no cost, unless the State agency provides the vendor with a list of pre-approved incentive items at the time of authorization; and

(iii) The State agency must define prohibited incentive items.

(i) *Retail food delivery systems: Vendor training—(1) General requirements.* The State agency must provide training annually to at least one representative of each vendor. Prior to or at the time of a vendor's initial authorization, and at least once every three years thereafter, the training must be in an interactive format that includes a contemporaneous opportunity for questions and answers. The State agency must designate the date, time, and location of the interactive training and the audience (e.g., managers, cashiers, etc.) to which the training is directed. The State agency must provide vendors with at least one alternative date on which to attend interactive training. Examples of acceptable vendor training include on-site cashier training, off-site classroom-style train-the-trainer or manager training, a training video, and a training newsletter. All vendor training must be designed to prevent program errors and noncompliance and improve program service.

(2) *Content.* The annual training must include instruction on the purpose of the Program, the supplemental foods authorized by the State agency, the minimum varieties and quantities of authorized supplemental foods that must be stocked by vendors, the requirement that vendors obtain infant formula only from sources included on

a list provided by the State agency, the procedures for transacting and redeeming food instruments and cash-value vouchers, the vendor sanction system, the vendor complaint process, the claims procedures, the State agency's policies and procedures regarding the use of incentive items, and any changes to program requirements since the last training.

(3) *Delegation.* The State agency may delegate vendor training to a local agency, a contractor, or a vendor representative if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(xi). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor training.

(4) *Documentation.* The State agency must document the content of and vendor participation in vendor training.

(j) *Retail food delivery systems: Monitoring vendors and identifying high-risk vendors.*—(1) *General requirements.* The State agency must design and implement a system for monitoring its vendors for compliance with program requirements. The State agency may delegate vendor monitoring to a local agency or contractor if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(iv). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor monitoring.

(2) *Routine monitoring.* The State agency must conduct routine monitoring visits on a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year in order to survey the types and levels of abuse and errors among authorized vendors and to take corrective actions, as appropriate. The State agency must develop criteria to determine which vendors will receive routine monitoring visits and must include such criteria in its State Plan in accordance with § 246.4(a)(14)(iv).

(3) *Identifying high-risk vendors.* The State agency must identify high-risk vendors at least once a year using criteria developed by FNS and/or other statistically-based criteria developed by the State agency. FNS will not

change its criteria more frequently than once every two years and will provide adequate advance notification of changes prior to implementation. The State agency may develop and implement additional criteria. All State agency-developed criteria must be approved by FNS.

(4) *Compliance investigations.* (i) *High-risk vendors.* The State agency must conduct compliance investigations of a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year. The State agency must conduct compliance investigations on all high-risk vendors up to the five percent minimum. The State agency may count toward this requirement a compliance investigation of a high-risk vendor conducted by a Federal, State, or local law enforcement agency. The State agency also may count toward this requirement a compliance investigation conducted by another WIC State agency provided that the State agency implements the option to establish State agency sanctions based on mandatory sanctions imposed by the other WIC State agency, as specified in paragraph (1)(2)(iii) of this section. A compliance investigation of a high-risk vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys have been conducted in which no program violations are found, or when an inventory audit has been completed.

(ii) *Randomly selected vendors.* If fewer than five percent of the State agency's authorized vendors are identified as high-risk, the State agency must randomly select additional vendors on which to conduct compliance investigations sufficient to meet the five-percent requirement. A compliance investigation of a randomly selected vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys are conducted in which no program violations are found, or when an inventory audit has been completed.

(iii) *Prioritization.* If more than five percent of the State agency's vendors are identified as high-risk, the State agency must prioritize such vendors so as to perform compliance investigations of those determined to have the greatest potential for program non-compliance and/or loss of funds.

(5) *Monitoring report.* For each fiscal year, the State agency must send FNS a summary of the results of its vendor monitoring containing information stipulated by FNS. The report must be sent by February 1 of the following fiscal year. Plans for improvement in the coming year must be included in the State Plan in accordance with § 246.4(a)(14)(iv).

(6) *Documentation*—(i) *Monitoring visits.* The State agency must document the following information for all monitoring visits, including routine monitoring visits, inventory audits, and compliance buys:

(A) the date of the monitoring visit, inventory audit, or compliance buy;

(B) the name(s) and signature(s) of the reviewer(s); and

(C) the nature of any problem(s) detected.

(ii) *Compliance buys.* For compliance buys, the State agency must also document:

(A) the date of the buy;

(B) a description of the cashier involved in each transaction;

(C) the types and quantities of items purchased, current shelf prices or prices charged other customers, and price charged for each item purchased, if available. Price information may be obtained prior to, during, or subsequent to the compliance buy; and

(D) the final disposition of all items as destroyed, donated, provided to other authorities, or kept as evidence.

(k) *Retail food delivery systems: Vendor claims*—(1) *System to review food instruments and cash-value vouchers for vendor claims.* The State agency must design and implement a system to review food instruments and cash-value vouchers submitted by vendors for redemption to ensure compliance with the applicable price limitations and to detect questionable food instruments or cash-value vouchers, suspected vendor overcharges, and other errors. This review must examine either all or a represent-

ative sample of the food instruments and cash-value vouchers and may be done either before or after the State agency makes payments on the food instruments or cash-value vouchers. The review of food instruments must include a price comparison or other edit designed to ensure compliance with the applicable price limitations and to assist in detecting vendor overcharges. For printed food instruments and cash-value vouchers the system also must detect the following errors—purchase price missing; participant, parent/caretaker, or proxy signature missing; vendor identification missing; food instruments or cash-value vouchers transacted or redeemed after the specified time periods; and, as appropriate, altered purchase price. The State agency must take follow-up action within 120 days of detecting any questionable food instruments or cash-value vouchers, suspected vendor overcharges, and other errors and must implement procedures to reduce the number of errors when possible.

(2) *Delaying payment and establishing a claim.* When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency must delay payment or establish a claim. Such vendor violations may be detected through compliance investigations, food instrument or cash-value voucher reviews, or other reviews or investigations of a vendor's operations. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument or cash-value voucher that contained the vendor overcharge or other error.

(3) *Opportunity to justify or correct.* When payment for a food instrument or cash-value voucher is delayed or a claim is established, the State agency must provide the vendor with an opportunity to justify or correct the vendor overcharge or other error. If satisfied with the justification or correction, the State agency must provide payment or adjust the proposed claim accordingly.

(4) *Timeframe and offset.* The State agency must deny payment or initiate claims collection action within 90 days of either the date of detection of the

vendor violation or the completion of the review or investigation giving rise to the claim, whichever is later. Claims collection action may include offset against current and subsequent amounts owed to the vendor.

(5) *Food instruments and cash-value vouchers redeemed after the specified period.* With justification and documentation, the State agency may pay vendors for food instruments and cash-value vouchers submitted for redemption after the specified period for redemption. If the total value of such food instruments or cash-value vouchers submitted at one time exceeds \$500.00, the State agency must obtain the approval of the FNS Regional Office before payment.

(1) *Retail food delivery systems: Vendor sanctions—(1) Mandatory vendor sanctions—(i) Permanent disqualification.* The State agency must permanently disqualify a vendor convicted of trafficking in food instruments or cash-value vouchers or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments or cash-value vouchers. A vendor is not entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency may impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents that:

(A) Disqualification of the vendor would result in inadequate participant access; or

(B) The vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(ii) *Six-year disqualification.* The State agency must disqualify a vendor for six years for:

(A) One incidence of buying or selling food instruments for cash (trafficking); or

(B) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802,

in exchange for food instruments or cash-value vouchers.

(iii) *Three-year disqualification.* The State agency must disqualify a vendor for three years for:

(A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments or cash-value vouchers;

(B) A pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time;

(C) A pattern of vendor overcharges;

(D) A pattern of receiving, transacting and/or redeeming food instruments or cash-value vouchers outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person;

(E) A pattern of charging for supplemental food not received by the participant; or

(F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments or cash-value vouchers.

(iv) *One-year disqualification.* The State agency must disqualify a vendor for one year for:

(A) A pattern of providing unauthorized food items in exchange for food instruments or cash-value vouchers, including charging for supplemental foods provided in excess of those listed on the food instrument; or

(B) A pattern of an above-50-percent vendor providing prohibited incentive items to customers as set forth in paragraph (g)(3)(iv) of this section, in accordance with the State agency's policies and procedures required by paragraph (h)(8) of this section.

(v) *Second mandatory sanction.* When a vendor, who previously has been assessed a sanction for any of the violations in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the second sanction. Civil money penalties may only be doubled up to the

limits allowed under paragraph (1)(1)(x)(C) of this section.

(vi) *Third or subsequent mandatory sanction.* When a vendor, who previously has been assessed two or more sanctions for any of the violations listed in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the third sanction and all subsequent sanctions. The State agency may not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section.

(vii) *Disqualification based on a Food Stamp Program disqualification.* The State agency must disqualify a vendor who has been disqualified from the Food Stamp Program. The disqualification must be for the same length of time as the Food Stamp Program disqualification, may begin at a later date than the Food Stamp Program disqualification, and is not subject to administrative or judicial review under the WIC Program.

(viii) *Voluntary withdrawal or nonrenewal of agreement.* The State agency may not accept voluntary withdrawal of the vendor from the Program as an alternative to disqualification for the violations listed in paragraphs (1)(1)(i) through (1)(1)(iv) of this section, but must enter the disqualification on the record. In addition, the State agency may not use nonrenewal of the vendor agreement as an alternative to disqualification.

(ix) *Participant access determinations.* Prior to disqualifying a vendor for a Food Stamp Program disqualification pursuant to paragraph (1)(1)(vii) of this section or for any of the violations listed in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section, the State agency must determine if disqualification of the vendor would result in inadequate participant access. The State agency must make the participant access determination in accordance with paragraph (1)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualifica-

tion. However, as provided in paragraph (1)(1)(vi) of this section, the State agency may not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in the file of each vendor who is disqualified or receives a civil money penalty in lieu of disqualification.

(x) *Civil money penalty formula.* For each violation subject to a mandatory sanction, the State agency must use the following formula to calculate a civil money penalty imposed in lieu of disqualification:

(A) Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of adverse action is dated;

(B) Multiply the average monthly redemptions figure by 10 percent (.10);

(C) Multiply the product from paragraph (1)(1)(x)(B) of this section by the number of months for which the store would have been disqualified. This is the amount of the civil money penalty, provided that the civil money penalty shall not exceed the maximum amount specified in § 3.91(b)(3)(v) of this title for each violation. For a violation that warrants permanent disqualification, the amount of the civil money penalty shall be the maximum amount specified in § 3.91(b)(3)(v) of this title for each violation. When during the course of a single investigation the State agency determines a vendor has committed multiple violations, the State agency must impose a CMP for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation may not exceed the amount specified in § 3.91(b)(3)(v) of this title as the maximum penalty for violations occurring during a single investigation.

(xi) *Notification to FNS.* The State agency must provide the appropriate FNS office with a copy of the notice of adverse action and information on vendors it has either disqualified or imposed a civil money penalty in lieu of

disqualification for any of the violations listed in paragraphs (1)(1)(i) through (1)(1)(iv) of this section. This information must include the name of the vendor, address, identification number, the type of violation(s), and the length of disqualification or the length of the disqualification corresponding to the violation for which the civil money penalty was assessed, and must be provided within 15 days after the vendor's opportunity to file for a WIC administrative review has expired or all of the vendor's WIC administrative reviews have been completed.

(xii) *Multiple violations during a single investigation.* When during the course of a single investigation the State agency determines a vendor has committed multiple violations (which may include violations subject to State agency sanctions), the State agency must disqualify the vendor for the period corresponding to the most serious mandatory violation. However, the State agency must include all violations in the notice of administration action. If a mandatory sanction is not upheld on appeal, then the State agency may impose a State agency-established sanction.

(2) *State agency vendor sanctions.* (i) *General requirements.* The State agency may impose sanctions for vendor violations that are not specified in paragraphs (1)(1)(i) through (1)(1)(iv) of this section as long as such vendor violations and sanctions are included in the State agency's sanction schedule. State agency sanctions may include disqualifications, civil money penalties assessed in lieu of disqualification, and administrative fines. The total period of disqualification imposed for State agency violations investigated as part of a single investigation may not exceed one year. A civil money penalty or fine may not exceed a maximum amount specified in § 3.91(b)(3)(v) of this title for each violation. The total amount of civil money penalties and administrative fines imposed for violations investigated as part of a single investigation may not exceed an amount specified in § 3.91(b)(3)(v) of this title as the maximum penalty for violations occurring during a single investigation. A State agency vendor

sanction must be based on a pattern of violative incidences.

(ii) *Food Stamp Program civil money penalty for hardship.* The State agency may disqualify a vendor that has been assessed a civil money penalty for hardship in the Food Stamp Program, as provided under § 278.6 of this chapter. The length of such disqualification must correspond to the period for which the vendor would otherwise have been disqualified in the Food Stamp Program. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such disqualification action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (1)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency may not disqualify the vendor or impose a civil money penalty in lieu of disqualification. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(iii) *A mandatory sanction by another WIC State agency.* The State agency may disqualify a vendor that has been disqualified or assessed a civil money penalty in lieu of disqualification by another WIC State agency for a mandatory vendor sanction. The length of the disqualification must be for the same length of time as the disqualification by the other WIC State agency or, in the case of a civil money penalty in lieu of disqualification assessed by the other WIC State agency, for the same length of time for which the vendor would otherwise have been disqualified. The disqualification may begin at a later date than the sanction imposed by the other WIC State agency. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (1)(8) of this section. If the

State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualification, except that the State agency may not impose a civil money penalty in situations in which the vendor has been assessed a civil money penalty in lieu of disqualification by the other WIC State agency. Any civil money penalty in lieu of disqualification must be calculated in accordance with paragraph (1)(2)(x) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(3) *Notification of violations.* The State agency must notify a vendor in writing when an investigation reveals an initial incidence of a violation for which a pattern of incidences must be established in order to impose a sanction, before another such incidence is documented, unless the State agency determines, in its discretion, on a case-by-case basis, that notifying the vendor would compromise an investigation. This notification requirement applies to the violations set forth in paragraphs (1)(1)(iii)(C) through (1)(1)(iii)(F), (1)(1)(iv), and (1)(2)(i) of this section.

(i) Prior to imposing a sanction for a pattern of violative incidences, the State agency must either provide such notice to the vendor, or document in the vendor file the reason(s) for determining that such notice would compromise an investigation.

(ii) The State agency may use the same method of notification which the State agency uses to provide a vendor with adequate advance notice of the time and place of an administrative review in accordance with § 246.18(b)(3).

(iii) If notification is provided, the State agency may continue its investigation after the notice of violation is received by the vendor, or presumed to be received by the vendor, consistent with the State agency's procedures for providing such notice.

(iv) All of the incidences of a violation occurring during the first compliance buy visit must constitute only one incidence of that violation for the

purpose of establishing a pattern of incidences.

(v) A single violative incidence may only be used to establish the violations set forth in paragraphs (1)(1)(ii)(A), (1)(1)(ii)(B), and (1)(1)(iii)(A) of this section.

(4) *Administrative reviews.* The State agency must provide administrative reviews of sanctions to the extent required by § 246.18.

(5) *Installment plans.* The State agency may use installment plans for the collection of civil money penalties and administrative fines.

(6) *Failure to pay a civil money penalty.* If a vendor does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the State agency must disqualify the vendor for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed (for a period corresponding to the most serious violation in cases where a mandatory sanction included the imposition of multiple civil money penalties as a result of a single investigation).

(7) *Actions in addition to sanctions.* Vendors may be subject to actions in addition to the sanctions in this section, such as claims pursuant to paragraph (k) of this section and the penalties set forth in § 246.23(c) in the case of deliberate fraud.

(8) *Participant access determination criteria.* The State agency must develop participant access criteria. When making participant access determinations, the State agency must consider the availability of other authorized vendors in the same area as the violative vendor and any geographic barriers to using such vendors.

(9) *Termination of agreement.* When the State agency disqualifies a vendor, the State agency must also terminate the vendor agreement.

(m) *Home food delivery systems.* Home food delivery systems are systems in which authorized supplemental foods are delivered to the participant's home. Home food delivery systems must provide for:

(1) *Procurement.* Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as the purchase of food in bulk

lots by the State agency and the use of discounts that are available to States.

(2) *Accountability.* The accountable delivery of authorized supplemental foods to participants. The State agency must ensure that:

(i) Home food delivery contractors are paid only after the delivery of authorized supplemental foods to participants;

(ii) A routine procedure exists to verify the correct delivery of authorized supplemental foods to participants, and, at a minimum, such verification occurs at least once a month after delivery; and

(iii) Records of delivery of supplemental foods and bills sent or payments received for such supplemental foods are retained for at least three years. Federal, State, and local authorities must have access to such records.

(n) *Direct distribution food delivery systems.* Direct distribution food delivery systems are systems in which participants, parents or caretakers of infant or child participants, or proxies pick up authorized supplemental foods from storage facilities operated by the State agency or its local agencies. Direct distribution food delivery systems must provide for:

(1) *Storage and insurance.* Adequate storage and insurance coverage that minimizes the danger of loss due to theft, infestation, fire, spoilage, or other causes;

(2) *Inventory.* Adequate inventory control of supplemental foods received, in stock, and issued;

(3) *Procurement.* Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as purchase of food in bulk lots by the State agency and the use of discounts that are available to States;

(4) *Availability.* The availability of program benefits to participants and potential participants who live at great distance from storage facilities; and

(5) *Accountability.* The accountable delivery of authorized supplemental foods to participants.

(o) *Participant, parent/caretaker, proxy, vendor, farmer and home food delivery contractor complaints.* The State agency must have procedures to document the handling of complaints by participants,

parents or caretakers of infant or child participants, proxies, vendors, farmers, home food delivery contractors, and direct distribution contractors. Complaints of civil rights discrimination must be handled in accordance with § 246.8(b).

(p) *Food instrument and cash-value voucher security.* The State agency must develop standards for ensuring the security of food instruments and cash-value vouchers from the time the food instruments and cash-value vouchers are created to the time they are issued to participants, parents/caretakers, or proxies. For pre-printed food instruments or cash-value vouchers, these standards must include maintenance of perpetual inventory records of food instruments or cash-value vouchers throughout the State agency's jurisdiction; monthly physical inventory of food instruments or cash-value vouchers on hand throughout the State agency's jurisdiction; reconciliation of perpetual and physical inventories of food instruments and cash-value vouchers; and maintenance of all food instruments and cash-value vouchers under lock and key, except for supplies needed for immediate use. For EBT and print-on-demand food instruments and cash-value vouchers, the standards must provide for the accountability and security of the means to manufacture and issue such food instruments and cash-value vouchers.

(q) *Food instrument and cash-value voucher disposition.* The State agency must account for the disposition of all food instruments and cash-value vouchers as either issued or voided, and as either redeemed or unredeemed. Redeemed food instruments and cash-value vouchers must be identified as validly issued, lost, stolen, expired, duplicate, or not matching valid enrollment and issuance records. In an EBT system, evidence of matching redeemed food instruments to valid enrollment and issuance records may be satisfied through the linking of the Primary Account Number (PAN) associated with the electronic transaction to valid enrollment and issuance records. This process must be performed within 120 days of the first valid date for participant use of the food instruments and must be conducted in accordance with

the financial management requirements of § 246.13. The State agency will be subject to claims as outlined in § 246.23(a)(4) for redeemed food instruments or cash-value vouchers that do not meet the conditions established in paragraph (q) of this section.

(r) *Issuance of food instruments, cash-value vouchers and authorized supplemental foods.* The State agency must:

(1) *Parents/caretakers and proxies.* Establish uniform procedures that allow parents and caretakers of infant and child participants and proxies to obtain and transact food instruments and cash-value vouchers or obtain authorized supplemental foods on behalf of a participant. In determining whether a particular participant or parent/caretaker should be allowed to designate a proxy or proxies, the State agency must require the local agency or clinic to consider whether adequate measures can be implemented to provide nutrition education and health care referrals to that participant or, in the case of an infant or child participant, to the participant's parent or caretaker;

(2) *Signature requirement.* Ensure that the participant, parent or caretaker of an infant or child participant, or proxy signs for receipt of food instruments, cash-value vouchers or authorized supplemental foods, except as provided in paragraph (r)(4) of this section;

(3) *Instructions.* Ensure that participants, parents or caretakers of infant and child participants, and proxies receive instructions on the proper use of food instruments and cash-value vouchers, or on the procedures for obtaining authorized supplemental foods when food instruments or cash-value vouchers are not used. The State agency must also ensure that participants, parents or caretakers of infant and child participants, and proxies are notified that they have the right to complain about improper vendor, farmer and home food delivery contractor practices with regard to program responsibilities;

(4) *Food instrument and cash-value voucher pick up.* Require participants, parents and caretakers of infant and child participants, and proxies to pick up food instruments and cash-value vouchers in person when scheduled for nutrition education or for an appoint-

ment to determine whether participants are eligible for a second or subsequent certification period. However, in all other circumstances the State agency may provide for issuance through an alternative means such as EBT or mailing, unless FNS determines that such actions would jeopardize the integrity of program services or program accountability. If a State agency opts to mail food instruments and cash-value vouchers, it must provide justification, as part of its alternative issuance system in its State Plan, as required in § 246.4(a)(21), for mailing food instruments and cash-value voucher to areas where food stamps are not mailed. State agencies that opt to mail food instruments and cash-value vouchers must establish and implement a system that ensures the return of food instruments and cash-value vouchers to the State or local agency if a participant no longer resides or receives mail at the address to which the food instruments and cash-value vouchers were mailed; and

(5) *Maximum issuance of food instruments and cash-value voucher.* Ensure that no more than a three-month supply of food instruments and cash-value vouchers or a one-month supply of authorized supplemental foods is issued at any one time to any participant, parent or caretaker of an infant or child participant, or proxy.

(6) *Any authorized vendor.* Each State agency shall allow participants to receive supplemental foods from any vendor authorized by the State agency under retail delivery systems.

(s) *Payment to vendors, farmers and home food delivery contractors.* The State agency must ensure that vendors, farmers and home food delivery contractors are paid promptly. Payment must be made within 60 days after valid food instruments or cash-value vouchers are submitted for redemption. Actual payment to vendors, farmers and home food delivery contractors may be made by local agencies.

(t) *Conflict of interest.* The State agency must ensure that no conflict of interest exists, as defined by applicable State laws, regulations, and policies,

between the State agency and any vendor, farmer or home food delivery contractor, or between any local agency and any vendor, farmer or home food delivery contractor under its jurisdiction.

(u) *Participant violations and sanctions*—(1) *General requirements.* The State agency must establish procedures designed to control participant violations. The State agency also must establish sanctions for participant violations. Participant sanctions may include disqualification from the Program for a period of up to one year.

(2) *Mandatory disqualification.* (i) *General.* Except as provided in paragraphs (u)(2)(ii) and (u)(2)(iii) of this section, whenever the State agency assesses a claim of \$100 or more, assesses a claim for dual participation, or assess a second or subsequent claim of any amount, the State agency must disqualify the participant for one year.

(ii) *Exceptions to mandatory disqualification.* The State agency may decide not to impose a mandatory disqualification if, within 30 days of receipt of the letter demanding repayment, full restitution is made or a repayment schedule is agreed on, or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(iii) *Terminating a mandatory disqualification.* The State agency may permit a participant to reapply for the Program before the end of a mandatory disqualification period if full restitution is made or a repayment schedule is agreed upon or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(3) *Warnings before sanctions.* The State agency may provide warnings before imposing participant sanctions.

(4) *Fair hearings.* At the time the State agency notifies a participant of a disqualification, the State agency must advise the participant of the procedures to follow to obtain a fair hearing pursuant to § 246.9.

(5) *Referral to law enforcement authorities.* When appropriate, the State agency must refer vendors, home food delivery contractors, and participants who violate program requirements to Fed-

eral, State, or local authorities for prosecution under applicable statutes.

(v) *Farmers.* The State agency may authorize farmers at farmers markets (or roadside stands) to accept the cash-value voucher for eligible fruits and vegetables. The State agency must enter into written agreements with all authorized farmers. The agreement must be signed by a representative who has legal authority to obligate the farmer and a representative of the State agency. The agreement must be for a period not to exceed three years. Only farmers authorized by the State agency may redeem the fruit and vegetable cash-value voucher. The State agency must require farmers to reapply at the expiration of their agreements and must provide farmers with not less than 15 days advance written notice of the expiration of the agreement.

(1) The agreement must include the following provisions, although the State agency may determine the exact wording. The farmer must:

(i) Assure that the cash-value voucher is redeemed only for eligible fruits and vegetables as defined by the State agency;

(ii) Provide eligible fruits and vegetables at the current price or less than the current price charged to other customers;

(iii) Accept the cash-value voucher within the dates of their validity and submit such vouchers for payment within the allowable time period established by the State agency;

(iv) Redeem the cash-value voucher in accordance with a procedure established by the State agency.

(v) Accept training on cash-value voucher procedures and provide training to any employees with cash-value voucher responsibilities on such procedures;

(vi) Agree to be monitored for compliance with program requirements, including both overt and covert monitoring;

(vii) Be accountable for actions of employees in the provision of authorized foods and related activities;

(viii) Pay the State agency for any cash-value vouchers transacted in violation of this agreement;

(ix) Offer WIC participants, parent or caretakers of child participants or

Food and Nutrition Service, USDA

§ 246.13

proxies the same courtesies as other customers;

(x) Comply with the nondiscrimination provisions of USDA regulations as provided in §248.7; and

(xi) Notify the State agency if any farmers' market ceases operation prior to the end of the authorization period.

(2) The farmer must not:

(i) Collect sales tax on cash-value voucher purchases;

(ii) Seek restitution from WIC participants, parent or caretakers of child participants or proxies for cash-value vouchers not paid or partially paid by the State agency;

(iii) Issue cash change for purchases that are in an amount less than the value of the cash-value voucher;

(3) Neither the State agency nor the farmer has an obligation to renew the agreement. Either the State agency or the farmer may terminate the agreement for cause after providing advance written notification.

(4) The State agency may deny payment to the farmer for improperly redeemed cash-value vouchers and may demand refunds for payments already made on improperly redeemed vouchers.

(5) The State agency may disqualify a farmer for WIC Program abuse. The farmer has the right to appeal a denial of an application to participate, a disqualification, or a program sanction by the State agency. Expiration of an agreement with a farmer and claims actions under §246.23, are not appealable.

(6) A farmer which commits fraud or engages in other illegal activity is liable to prosecution under applicable Federal, State or local laws.

[65 FR 83278, Dec. 29, 2000, as amended at 70 FR 29579, May 24, 2005; 70 FR 71722, Nov. 29, 2005; 71 FR 56731, Sept. 27, 2006; 73 FR 68995, Dec. 6, 2007; 73 FR 11312, Mar. 3, 2008; 74 FR 555, Jan. 6, 2009; 74 FR 51758, Oct. 8, 2009; 75 FR 15603, Mar. 30, 2010]

§ 246.13 Financial management system.

(a) *Disclosure of expenditures.* The State agency shall maintain a financial management system which provides accurate, current and complete disclosure of the financial status of the Program. This shall include an accounting for all property and other as-

sets and all Program funds received and expended each fiscal year.

(b) *Internal control.* The State agency shall maintain effective control over and accountability for all Program grants and funds. The State agency must have effective internal controls to ensure that expenditures financed with Program funds are authorized and properly chargeable to the Program.

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for Program activities. These records shall contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State shall implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, 7 CFR part 3016, and FNS guidelines and instructions.

(e) *Identification of obligated funds.* The State agency shall implement procedures which accurately identify obligated Program funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures which ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Use of minority- and women-owned banks.* Consistent with the national goals of expanding opportunities for minority business enterprises, State and local agencies are encouraged to use minority- and women-owned banks.

(h) *Adjustment of expenditures.* The State agency must adjust projected expenditures to account for redeemed food instruments and for other changes as appropriate.

(i) *Transfer of cash.* The State agency shall have controls to minimize the time elapsing between receipt of Federal funds from the U.S. Department of Treasury and the disbursements of these funds for Program costs. In the Letter of Credit system, the State agency shall make drawdowns from the